

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
KSAZ License, Inc.)	File No. EB-03-IH-0256
)	Facility ID No. 35587
Licensee of Station KSAZ(TV))	
Phoenix, Arizona)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 2004

Released: August 9, 2004

By the Commission:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we deny a complaint by Americans for Decency¹ and related complaints alleging that KSAZ License, Inc. (“KSAZ”), the licensee of Station KSAZ(TV), Phoenix, Arizona, aired indecent material during the “Will and Grace” program on March 31, 2003, between the hours of 6:00 and 7:00 p.m.² The complainants allege that the “Will and Grace” episode at issue included a scene in which “[a] woman photographer passionately kissed [a] woman author and then humped her (what she called a ‘dry hump.’)”³ We find that the material is not “patently offensive” under the Commission’s indecency analysis.

II. DISCUSSION

2. The Federal Communications Commission is authorized to license radio and television broadcast stations and is responsible for enforcing the Commission’s rules and applicable statutory provisions concerning the operation of those stations. The Commission’s role in overseeing program content is very limited. The First Amendment to the United States Constitution and section 326 of the Communications Act of 1934, as amended, (the “Act”) prohibit the Commission from censoring program material and from interfering with broadcasters’ freedom of expression.⁴ The Commission does, however, have the authority to enforce statutory and regulatory provisions restricting indecency and obscenity. Specifically, it is a violation of federal law to broadcast obscene or indecent programming. Title 18 of the

¹ See Letter from Americans for Decency to Michael Powell, Chairman, Federal Communications Commission, received May 7, 2003.

² 47 U.S.C. § 503(b); 47 C.F.R. § 1.80

³ Though not specifically defined in the complaint, “dry humping” is commonly understood to consist of two people rubbing their clothed bodies together for sexual stimulation.

⁴ U.S. CONST., amend. I; 47 U.S.C. § 326 (2002).

United States Code, Section 1464 prohibits the utterance of “any obscene, indecent or profane language by means of radio communication.”⁵ In addition, section 73.3999 of the Commission’s rules provides that radio and television stations shall not broadcast obscene material at any time, and, consistent with a subsequent statute and court case,⁶ shall not broadcast indecent material during the period 6 a.m. through 10 p.m.⁷ The Commission may impose a monetary forfeiture, pursuant to Section 503(b)(1) of the Act,⁸ upon a finding that the licensee has broadcast indecent material in violation of 18 U.S.C. § 1464 and Section 73.3999 of the rules.

A. Indecency Analysis

3. Any consideration of government action against allegedly indecent programming must take into account the fact that such speech is protected under the First Amendment.⁹ The federal courts consistently have upheld Congress’s authority to regulate the broadcast of indecent material, as well as the Commission’s interpretation and implementation of the governing statute.¹⁰ Nevertheless, the First Amendment is a critical constitutional limitation that demands that, in indecency determinations, we proceed cautiously and with appropriate restraint.¹¹

4. The Commission defines indecent speech as language that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.¹²

Indecency findings involve at least two fundamental determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition—that is, the material must describe or depict sexual or excretory organs or activities. . . . Second, the broadcast must

⁵ 18 U.S.C. § 1464.

⁶ Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (1992) (setting the current safe harbor of 10 p.m. to 6 a.m. for the broadcast of indecent material); *see also* *Action for Children’s Television v. FCC*, 58 F. 3d 654 (D.C. Cir. 1995) (*en banc*) (“*ACT IIP*”), *cert. denied*, 516 U.S. 1072 (1996) (affirming restrictions prohibiting the broadcast of indecent material between the hours of 6 a.m. and 10 p.m.).

⁷ *See* 47 C.F.R. § 73.3999.

⁸ *See* 47 U.S.C. § 503(b)(1).

⁹ U.S. CONST., amend. I; *See Action for Children’s Television v. FCC*, 852 F.2d 1332, 1344 (D.C. Cir. 1988) (“*ACT F*”).

¹⁰ Title 18 of the United States Code, Section 1464 (18 U.S.C. § 1464), prohibits the utterance of “any obscene, indecent or profane language by means of radio communication.” *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). *See also* *ACT I*, 852 F.2d at 1339; *Action for Children’s Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 914 (1992) (“*ACT IP*”); *Action for Children’s Television v. FCC*, 58 F. 3d 654 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1043 (1996) (“*ACT III*”).

¹¹ *ACT I*, 852 F.2d at 1344, 1340 n.14 (“Broadcast material that is indecent but not obscene is protected by the First Amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what people may say and hear.”); *see id.* at 1340 n.14 (“...the potential chilling effect of the FCC’s generic definition of indecency will be tempered by the Commission’s restrained enforcement policy.”).

¹² *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987) (subsequent history omitted) (*citing Pacifica Foundation*, 56 FCC 2d 94, 98 (1975), *aff’d sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)).

be *patently offensive* as measured by contemporary community standards for the broadcast medium.¹³

It is not clear that the material aired during the “Will and Grace” program identified by the complainants depicts sexual activities and, therefore, warrants further scrutiny to determine whether it is patently offensive as measured by contemporary community standards. Even were the material to fit within the subject matter scope of the indecency prohibition, however, we conclude that it is not patently offensive.

5. In our assessment of whether broadcast material is patently offensive, “the *full context* in which the material appeared is critically important.”¹⁴ Three principal factors are significant to this contextual analysis: (1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate or shock.¹⁵ In examining these three factors, we must weigh and balance them to determine whether the broadcast material is patently offensive because “[e]ach indecency case presents its own particular mix of these, and possibly, other factors.”¹⁶ In particular cases, the weight of one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent,¹⁷ or, alternatively, removing the broadcast material from the realm of indecency.¹⁸

6. After reviewing the relevant episode, we conclude that material broadcast on the “Will and Grace” program at issue is not sufficiently explicit or graphic to be indecent. Both characters are fully clothed, and there is no evidence that the activity depicted was dwelled upon, or was used to pander, titillate or shock the audience. Accordingly, we conclude that KSAZ did not violate the Commission’s indecency prohibition by airing the “Will and Grace” program on March 31, 2003.

III. ORDERING CLAUSES

7. ACCORDINGLY, IT IS ORDERED, that the above-referenced complaints filed against KSAZ License, Inc.’s broadcast of the “Will and Grace” program on March 31, 2003, are hereby DENIED.

¹³ *Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency (“Indecency Policy Statement”)*, 16 FCC Rcd 7999, 8002, ¶¶ 7-8 (2001) (emphasis in original).

¹⁴ *Indecency Policy Statement*, 16 FCC Rcd at 8002, ¶ 9 (emphasis in original).

¹⁵ *Id.* at 8002-15, ¶¶ 8-23.

¹⁶ *Id.* at 8003, ¶ 10.

¹⁷ *Id.* at 8009, ¶ 19 (citing *Tempe Radio, Inc. (KUPD-FM)*, 12 FCC Rcd 21828 (MMB 1997) (forfeiture paid) (extremely graphic or explicit nature of references to sex with children outweighed the fleeting nature of the references); *EZ New Orleans, Inc. (WEZB(FM))*, 12 FCC Rcd 4147 (MMB 1997) (forfeiture paid) (same)).

¹⁸ *Indecency Policy Statement*, 16 FCC Rcd at 8010, ¶ 20 (“the manner and purpose of a presentation may well preclude an indecency determination even though other factors, such as explicitness, might weigh in favor of an indecency finding”).

8. IT IS FURTHER ORDERED, that a copy of this Memorandum Opinion and Order shall be sent by Certified Mail Return Receipt Requested to Americans for Decency, 3431 W. Thunderbird Road, Box 275, Phoenix, Arizona 85053-5641.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary